Office-Supreme Court, U.S.
FILED
MAR 23 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY AND CITICORP,

Petitioners,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FLEET FINANCIAL GROUP, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' POSITION

Of Counsel:
EDWARD W. DENCE, JR.
WILLIAM C. MUTTERPERL

WILLIAM G. DELANA
ALLAN B. TAYLOR
J. BRUCE BOISTURE*
ROBERT M. TAYLOR, III
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
Counsel for *Amicus Curiae*
Fleet Financial Group, Inc.

**Counsel of Record*

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FLEET FINANCIAL GROUP, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' POSITION

INTEREST OF *AMICUS CURIAE*

Fleet Financial Group, Inc. ("Fleet") is a bank holding company registered under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 *et seq.* (the "BHC Act"). Its principal subsidiary is Fleet National Bank, a national banking association with its principal place of business in Providence, Rhode Island. On October 4, 1984, the Board of

Governors of the Federal Reserve System (the "Board") approved Fleet's application, pursuant to the BHC Act, to acquire two newly chartered national banking associations, one located in Hartford, Connecticut, and the other in Boston, Massachusetts. *Fleet Financial Group, Inc.*, 70 Fed. Res. Bull. 881 (1984).

Fleet's acquisition of these two banks was approved by the Board based on the two state statutes challenged in this case, "An Act Concerning Interstate Banking," 1983 Conn. Acts 411 (the "Connecticut Act") and Mass. Gen. Laws Ann. ch. 167A (West Supp. 1984) (the "Massachusetts Act").[1] Citicorp, a petitioner in this case, sought review of the Board's approval of Fleet's application in the United States Court of Appeals for the Second Circuit. The Court of Appeals, based on its earlier decision in the present case, sustained the Board's order approving Fleet's application.

Citicorp thereupon petitioned this Court for review of the decision of the Court of Appeals. *See* Petition for Writ of Certiorari in No. 84-754, to which the order of the Court of Appeals is appended as Appendix B. This Court has not yet acted on the Petition in No. 84-754.

Fleet's interest as an *amicus curiae* in this case is obvious and immediate. Only if the Connecticut and Massachusetts Acts are sustained against the challenge mounted by Petitioners in this case will Fleet be able to complete its proposed acquisition of the two new banks in Hartford and Boston.

All of the parties to this case have consented in writing to the filing of this brief and their consents have been filed along with the brief.

SUMMARY OF ARGUMENT

1. *The Douglas Amendment.* Congress, in enacting the Douglas Amendment in 1956, prohibited bank holding companies from acquiring banks located outside of their respective home states. In doing so, Congress followed its longstanding approach to the regulation of the geographic structure of the banking industry in the United States, favoring local markets and local regulation and control.

[1]The Connecticut Act was amended by 1984 Conn. Acts 329, and is codified at Section 36-552 *et seq.* of the General Statutes of Connecticut.

Indeed, in furtherance of the policy of local regulation and control, Congress granted to the states in the Douglas Amendment the authority to permit interstate bank acquisitions by bank holding companies that otherwise would be prohibited by the Douglas Amendment. The Connecticut and Massachusetts Acts are squarely within this authority granted to the states by Congress and therefore do not violate the Commerce Clause.

The language of the Douglas Amendment does not include any exceptions to or restrictions on the authority it confers upon the states, and the legislative history of the Douglas Amendment supports the conclusion that Congress meant to grant to the states its full regulatory authority under the Commerce Clause. In particular, neither the language nor the legislative history of the Douglas Amendment indicates that the states lack the authority to adopt a limited approach to bank holding company expansion such as that found in the Connecticut and Massachusetts Acts. In view of the localism and market segmentation reflected in the Douglas Amendment's general prohibition on interstate bank acquisitions by bank holding companies, it is hardly surprising to find that Congress granted to the states an unqualified authority that could be used by the states only to create less confined and more extensive banking markets.

The ability of the states to permit entry of out-of-state bank holding companies on a limited basis pursuant to the Douglas Amendment consistently has been recognized and approved in past judicial and administrative decisions. These limited entry statutes have taken the form of grandfather statutes (discriminating against some out-of-state bank holding companies), limited purpose entry statutes (discriminating against the permissible activities of all out-of-state bank holding companies), reciprocal statutes (discriminating against some out-of-state bank holding companies), and regional statutes (discriminating against some out-of-state bank holding companies). All of these types of statutes consistently have been upheld as valid exercises of state authority under the Douglas Amendment.

Petitioners mistakenly rely on the cases of this Court that have outlined and applied to state laws the negative implications of the Commerce Clause. As the decisions of this

Court make clear, once Congress acts to regulate or restrict commerce, or to grant to the states the authority to regulate or restrict commerce, the negative implications of the Commerce Clause are inapplicable to actions taken by Congress, or taken by the states within the scope of such authority. Because the Connecticut and Massachusetts Acts were adopted pursuant to the authority granted to the states in the Douglas Amendment, they are immune from the Commerce Clause challenge mounted against them by Petitioners.

2. *The Compact Clause.* The Connecticut and Massachusetts Acts are independently enacted state statutes evidencing a legitimate exercise by each state of the authority granted to it through the Douglas Amendment. Such independent exercises of specifically granted congressional authority do not give rise to a compact between the states for purposes of the Compact Clause.

Even if an agreement or compact were somehow deemed to exist, the Connecticut and Massachusetts Acts are nevertheless permissible under settled Compact Clause doctrine. Not all agreements or compacts between or among states are prohibited by the Compact Clause. Rather, only those agreements or compacts that increase the political power of the states or encroach upon or interfere with the just supremacy of the United States are prohibited without congressional consent. *United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 471 (1978). Thus, leaving aside the fact that Congress has consented to the Connecticut and Massachusetts Acts through the authority it granted to the states in the Douglas Amendment, those Acts do not offend the Compact Clause because they neither increase the political power or influence of the states nor encroach upon the supremacy of the United States.

ARGUMENT

I. The Douglas Amendment Authorizes The Connecticut And Massachusetts Acts

Petitioners' entire argument, in a nutshell, is that it is impossible to suppose that Congress would have granted to

the states the authority to permit interstate bank holding company expansion on the regional, reciprocal basis found in the Connecticut and Massachusetts Acts. In the midst of their alarmist statements about compacts, confederacies, and threats to the Union, however, Petitioners fail to take account of the legitimate localism that has shaped congressional regulation of the structure of the banking industry for one hundred and fifty years.

When the charter of the Second Bank of the United States expired in 1836, attempts to construct a national banking system structured by federal law ended with it. Since that time, the banking industry has developed on a local basis, with Congress recognizing and deferring to the authority of the states to shape the geographic structure of the industry. The enactment of the Douglas Amendment in 1956 merely continued this pattern of regulation, in the then-novel context of bank holding companies, by authorizing the states to determine if and to what extent interstate expansion of bank holding companies would be permissible. The Connecticut and Massachusetts Acts are within the scope of this authorization and therefore are protected from the unfounded Commerce Clause attack mounted by Citicorp and the other Petitioners.

A. The Douglas Amendment Evidences Continued Congressional Deference To The Legitimate Localism That Has Shaped The Structure of the Banking Industry In the United States

The Douglas Amendment generally restricts each bank holding company to the acquisition of banks in only one state.[2] The bank holding company legislation originally proposed by the Senate Banking Committee in 1956, S. 2577, contained no such restriction. S. Rep. No. 1095, 84th Cong., 1st Sess. 10-11 (1955). But H.R. 6227, a comparable legislative proposal

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[2]The Douglas Amendment, enacted as ch. 240, § 3 (d), 70 Stat. 134 (1956) and codified at 12 U.S.C. § 1842(d), provides, in relevant part, that:

> Notwithstanding any other provision of this section, no application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any

for the regulation of bank holding companies, specifically limited bank holding companies to the ownership of banks in a single state. H.R. Rep. No. 609, 84th Cong., 1st Sess. 14-15 (1955). The effect of Senator Douglas' amendment to S. 2577 was to bring the Senate bill more into line with the House bill on this point, establishing a basic pattern of state-by-state organization of the bank holding company system. This proposal was subsequently adopted as part of the BHC Act.

This was not a novel approach for Congress in shaping the structure of the banking industry. Since 1836, when the charter of the Second Bank of the United States expired, Congress has consistently deferred to the states in the regulation of the geographic structure of the banking industry. Subsequent to the demise of the Second Bank of the United States, all banking services were provided by banks chartered and regulated under state law until 1863, when the National Currency Act (later amended by the National Bank Act of 1864) authorized the chartering of national banking associations.[3] These new national banks, although chartered under federal law, were not national in respect to their geographic operations but were limited to a single banking office. Even when branching was permitted to national banks by the enactment of the McFadden Act in 1927,[4] each national bank was limited to branching within its home state, and continues to this day to be thus limited. "The Congress . . . has steadfastly respected the rights of the states to specify the extent to which branch banking shall be practiced within their respective borders." H.R. Rep. No. 609, *supra,* at 3.

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voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted . . . unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

[3]J. White, *Banking Law* 16-19 (1976).

[4]Ch. 191, § 7, 44 Stat. 1228, codified at 12 U.S.C. § 36.

The Douglas Amendment expressly recognizes and reiterates this longstanding policy of localism in the organization and regulation of this country's banking industry. It generally forbids the approval by the Board of any application by a bank holding company to acquire a bank located outside of the holding company's home state.[5] Thus, as a general matter, the Douglas Amendment separates the nation into numerous local banking markets for purposes of structuring the bank holding company system, just as the McFadden Act separates, on a state-by-state basis, the geographic structure of the branch banking system.

This basic regulatory pattern for the structure of the banking industry, as established by Congress, is the antithesis of the national market so often identified as the object of the Commerce Clause. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322, 325-326 (1979). It is nonetheless the pattern long established for the United States banking industry, reflecting a clear congressional judgment that because of its critical role in our economy, the banking industry should be localized, not nationalized.

> The United States early in its history, it should be recalled, adopted a democratic ideal of banking. Other countries . . . have preferred to rely on a few large banks controlled by a banking elite. There has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community . . . .

H.R. Rep. No. 609, *supra,* at 2. As Senator Douglas commented when introducing his amendment, "the pending bill, and the amendment which has just been read, are in the true American tradition, for what the sponsors of the amendment are seeking to do is to prevent an undue concentration of banking and financial power . . . . " 102 Cong. Rec. 6857 (1956).

This localized approach to the regulation of the banking industry's structure, although unusual, is not unique. In

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[5]This general prohibition, of course, is subject to relaxation by the states, as discussed *infra.*

enacting the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, Congress similarly recognized that local organization and regulation should prevail with respect to another important financial intermediary, the insurance industry. *Western & Southern Life Ins. Co. v. Board of Equalization,* 451 U.S. 648, 654 (1981) (insurance business was judged by Congress to be " 'a local matter, to be subject to and regulated by the laws of the several States,' " *quoting* H.R. Rep. No. 143, 79th Cong., 1st Sess. 2 (1945)); *accord, Prudential Ins. Co. v. Benjamin.* 328 U.S. 408, 429-430 (1946). This congressional recognition of the pattern of local organization and regulation of the insurance business made unobjectionable the retaliatory state tax at issue in *Western & Southern Life Ins. Co. v. Board of Equalization, supra,* 451 U.S., at 655.

In even more dramatic fashion, Congress, in the National Bank Act, the McFadden Act, and the Douglas Amendment, has likewise "balkanized"[6] the geographic structure of the banking industry. The clarity of this action leaves no doubt that, in the area of banking, Congress has directly addressed the issue of the proper geographic structuring of the banking industry in the United States. Because of a variety of political and economic considerations summarized in the passages quoted above, Congress has established and approved not a national market in which state boundaries are irrelevant, but rather a highly segmented and localized market. Congress, acting under the plenary authority granted to it by the Commerce Clause, may legitimately impose such restrictions and limitations on interstate commerce. *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S., at 434. The emphatic congressional judgment embodied in the Douglas Amendment that the banking industry is to be locally, not nationally, organized and regulated sets the context within which the scope of state authority granted through the Douglas Amendment must be evaluated.

B. The Douglas Amendment Authorizes the States to Permit Interstate Bank Holding Company Expansion on a Regional, Reciprocal Basis

The Douglas Amendment, while generally prohibiting bank

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[6] *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 533-534 (1949).

holding company expansion across state boundaries, also establishes a special rule permitting the states to make exceptions to this general prohibition. In relevant part, the Douglas Amendment states that the Board may not approve an acquisition of a bank located in one state by a bank holding company with its principal operations in any other state unless:

> the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

12 U.S.C. § 1842(d). As Petitioners acknowledge, the language of this exception places no restrictions on the types of state laws to which the Board is to defer (Br. of Pet. Citicorp, 21). Rather, the language of this exception recognizes an unrestricted authority in each state to determine whether and to what extent out-of-state bank holding companies may be permitted to purchase banks located within their boundaries.

Nothing in this Court's comments regarding the Douglas Amendment in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), contradicts this conclusion that the Douglas Amendment grants to the states broad discretion to alter the basic restriction established by Congress. In that case, the Court considered a challenge to the validity of a Florida statute that prohibited out-of-state bank holding companies from establishing or acquiring an investment advisory business in Florida. The State of Florida, in defense of its statute, argued, *inter alia,* that the Douglas Amendment authorized it to impose such a restriction on the activities of out-of-state bank holding companies in Florida. Observing that the Douglas Amendment applies only to acquisitions of banks regulated under Section 3 of the BHC Act, this Court rejected the suggestion that Florida could rely on the Douglas Amendment to justify restrictions on nonbanking activities regulated under Section 4 of the Act. *Id.*, at 47 & n. 13. In any event, the Court observed, the Douglas Amendment grants to the states the authority to relax the general restriction imposed by Congress (although not the authority to further restrict the market structure established by the BHC Act).

> The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited.

Id. at 47. This limited authority to *permit* interstate banking, and no other, is precisely that asserted by Connecticut and Massachusetts in enacting the Connecticut and Massachusetts Acts.[7]

Despite the absence from the statutory language of any qualification on the authority granted to the states, Petitioners contend that the Douglas Amendment confronts the states with an "all-or-nothing" choice if they desire to alter the Douglas Amendment's general restriction on a *geographic* basis.[8] Petitioners assert that states may retain the state-by-state system established by the Douglas Amendment's general rule, or may permit entry by bank holding companies from throughout the country, but may not allow entry on a regional

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[7]Petitioners, referring to this Court's discussion in *Lewis* of Section 7 of the BHC Act, argue that because Section 7 was not meant to alter the Commerce Clause restrictions normally applicable to state authority in the absence of a delegation of regulatory authority by Congress, "it follows *a fortiori* that the Douglas Amendment . . . has no such extraordinary effect." Br. of Pet. Citicorp, 22. This is an evident *non sequitur*. Nothing in the language or legislative history of the BHC Act suggests any such connection between Section 7 and Section 3(d), the Douglas Amendment. Section 7, as the Court recognized in *Lewis*, was meant only to preserve state regulatory authority over bank holding companies as it existed prior to 1956. 447 U.S., at 48-49. But this Court did not suggest in *Lewis* that the characterization of Section 7 as a savings provision for state law had any implications whatsoever for the issue of the scope of the authority granted to the states under the Douglas Amendment. When Congress simply defers to otherwise valid state laws, as it did when it enacted Section 7, the "negative implications of the Commerce Clause . . . are ingredients of the *valid* state law to which Congress has deferred." *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982). But when, as in Section 3(d), Congress goes beyond mere deference to grant authority to the states under the Commerce Clause, the negative implications of the Commerce Clause become irrelevant. See Section I.D. *infra*.

[8]Petitioners' attempt to save this argument from immediate rejection by identifying permissible *non*-geographic bases on which states may permissibly impose discriminatory restrictions under the Douglas Amendment is discussed in Section I.D. *infra*.

basis. This argument, however, ignores the fact that in adopting the Douglas Amendment, Congress created a highly localized banking structure, rejecting a national approach to this industry. Viewed against this background, the regulatory authority granted to the states in the Douglas Amendment can only reasonably be interpreted to permit the states a more finely calibrated instrument for adjusting the banking structure than the blunt all-or-nothing approach urged by Petitioners. There is nothing at all implausible about the proposition that Congress meant to permit the states to adopt a regional approach to bank holding company expansion, once it is recognized that the basic system established by Congress has already separated the nation into numerous, even more restrictive, local banking markets.

The legislative history of the Douglas Amendment supports this conclusion that Congress did not intend to qualify or limit the authority it granted to the states to permit interstate bank holding company expansion. Senator Douglas, in explaining his amendment, remarked directly that "our amendment will permit out-of-State holding companies to acquire banks in other States *only to the degree* that State laws expressly permit them . . . ." 102 Cong. Rec. 6858 (1956) (emphasis added). To describe the all-or-nothing law that Petitioners wish had been enacted, Senator Douglas would have said, "only *if* State laws expressly permit them." Senator Douglas' use of the expression "*to the degree* that State laws expressly permit them," indicates the understanding that the states were to be granted authority to permit various methods of interstate banking best suited to address the local concerns and needs of the individual states. Despite Petitioners' unfounded complaints about the brevity of the legislative history of this floor amendment to the BHC Act, it is difficult to see what repetition would have added to Senator Douglas' basic characterization of the Douglas Amendment's grant of authority to the states.

Senator Payne, in support of Senator Douglas' proposed amendment, likewise characterized it as granting to the states the authority to permit interstate bank holding company expansion on a basis judged to be sound and acceptable by each state. Describing the proposed amendment, Senator Payne observed that:

> This amendment would require that State legislatures pass specific legislation authorizing bank holding companies from another State to acquire interests in State banks located within its [sic] borders.

102 Cong. Rec. 6862 (1956). Again, had the amendment been meant to allow states only the authority to permit full national interstate banking, Senator Payne would have spoken not of "another State" but of "other States."[9] He, like Senator Douglas, however, understood that the grant of authority to the states in the Douglas Amendment was not meant to give to the states such a limited range of options. Rather "[t]he purpose of this amendment," he asserted, "is to return to the States their traditional control over the activities of the State banks now nominally under the State's authority." *Id.* According to Senator Payne,

> the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State governments and is an area best left to their discretion rather than to have it solely under the jurisdiction of the Federal Reserve Board [as initially proposed in the Senate bill].

Id.

Senator Douglas' comparison of his proposed amendment to the McFadden Act further supports the conclusion that the exception provided in the Douglas Amendment was meant to give the states broad control and discretion in shaping the interstate bank holding company structure. The McFadden Act restricts each national bank to establishing branch offices in the state in which its principal office is located, subject to the branching restrictions of state law. 12 U.S.C. § 36.[10] Acting

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[9]Senator Douglas used the same expression when he spoke of individual states permitting "a bank holding company from *another State*" to make interstate acquisitions. 102 Cong. Rec. 6860 (1956) (emphasis added).

[10]The McFadden Act permits limited branching for national banks, subject to state law. See note 4 *supra*. This provision was amended in 1933 to permit national banks to establish branch offices within their home states, subject to the restrictions imposed by state bank branching laws. 48 Stat. 162, § 23 (1933). *See* G. Fischer, *American Banking Structure* 47-52 (1968).

under the authority of the McFadden Act, the various states have subjected national banks to a variety of branch banking rules.[11] Comparing his proposed amendment to the McFadden Act, Senator Douglas stated that:

> [The amendment] is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

102 Cong. Rec. 6860 (1956).

Whatever the purpose for which the McFadden Act was enacted,[12] Senator Douglas accurately characterized its effect of subjecting branching by national banks to the requirements of state law. Likewise, in his view, his amendment was meant to permit the states to effectuate their various policies for the structure of the bank holding company system within their borders. Just as the McFadden Act imposed no limitations on state regulation of branch banking, Senator Douglas noted no qualifications on the authority to be granted to the states "to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Lewis v. BT Investment Managers, Inc., supra,* 447 U.S., at 47.

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[11]These state branching rules have taken the form of, for example, unit banking (*see, e.g.,* Ill. Rev. Stat. ch. 16 1/2, § 5 (1982)); county-wide branching (*see, e.g.,* Mass. Gen. Laws. Ann. ch. 167C, § 3 (1982)); and full statewide branching (*see, e.g.,* Conn. Gen. Stat. § 36-59 (1985)). Just as the states are granted complete control over the structure of branch banking within their borders through the McFadden Act, Senator Douglas intended that his amendment would grant to the states complete control over the structure of bank holding company expansion within their borders.

[12]Some commentators view the McFadden Act as primarily a parity bill meant to grant to national banks branching powers comparable to the state banks with which they compete. *See, e.g.,* 102 Cong. Rec. 6754 (1956) (remarks of Senator Robertson); Br. of Pet. Citicorp, 28. Whatever the merit of this view, the fact remains, as emphasized by other commentators, that the McFadden Act is also restrictive in nature, subjecting national banks to state branch banking laws. *See, e.g.,* 102 Cong. Rec. 6860 (1956) (remarks of Senator Douglas).

C. Prior Administrative and Judicial Decisions Have Concluded that the Douglas Amendment Authorizes the States to Differentiate Among Out-of-State Bank Holding Companies in Creating Exceptions to the Douglas Amendment's General Prohibition on Interstate Banking

When the Douglas Amendment was adopted in 1956, no state had adopted laws permitting interstate bank holding company expansion. 102 Cong. Rec. 6860 (1956) (remarks of Senator Douglas). Iowa adopted the first such law in 1972.[13] Under its terms, only one out-of-state bank holding company, Northwest Bancorporation, qualified (on a grandfathered basis) to make additional acquisitions in Iowa. The Board, in approving Northwest Bancorporation's application for an acquisition pursuant to the Iowa statute, rejected the argument that "in enacting the Bank Holding Company Act and its Amendments, Congress did not intend to allow State legislatures to *choose selectively* which out-of-state bank holding company could enter the State . . . "[14]

Since its *Northwest Bancorporation* decision, the Board has approved numerous interstate acquisitions based on state statutes that differentiate among out-of-state bank holding companies in permitting entry. In addition to acquisitions involving other state grandfathering statutes similar to the Iowa law,[15] the Board has approved acquisitions involving state laws permitting out-of-state bank holding companies to enter a state for limited purposes,[16] or subject to a reciprocity requirement imposed on the laws of their home states.[17] The Board observed in its decision in the present case that:

> These [state] statutes obviously result in some burdens on interstate commerce and appear to assume that the

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[13]The Iowa statute is set out in *Iowa Independent Bankers v. Board of Governors,* 511 F.2d 1288, 1292 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975).

[14]*Northwest Bancorporation,* 38 Fed. Reg. 21530, 21531-21532 (1973), *aff'd, Iowa Independent Bankers v. Board of Governors,* 511 F.2d 1288 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975) (emphasis added).

[15]*E.g., NCNB Corporation,* 68 Fed. Res. Bull. 54 (1982).

[16]*E.g., Citicorp,* 70 Fed. Res. Bull. 431 (1984).

[17]*E.g., Norstar Bancorp, Inc.,* 69 Fed. Res. Bull. 306 (1983).

> states have full discretion to set the terms of entry of out-of-state bank holding companies.

Pet. App. A71. Summarizing its careful review of the Douglas Amendment in the present case, the Board, while noting some uncertainty about the legislative history of the Amendment, continued to take the same view of the authority that it confers on the states:

> [I]t can be persuasively argued that Senator Douglas construed his amendment as granting plenary power to the states to set their own policies and permit entry of out-of-state bank holding companies to the degree that they choose.

Pet. App. A67.

In a recent decision, the Board reiterated its view that the Douglas Amendment's delegation of authority to the states does not force the states to adopt an " 'all or nothing' approach to permitting entry by out-of-state bank holding companies."[18] As the Board commented in this decision, "[t]he states and the Board have consistently construed the Douglas

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[18] *Bank of New York Company, Inc.*, 70 Fed. Res. Bull. 527, 528 (1984). In that decision, the Board rejected the argument, advanced in this Court by *amicus curiae* Bank of New York Company, that any state enacting a limited entry authorization statute pursuant to the Douglas Amendment's special rule thereby effectively (albeit unintentionally) authorizes unlimited entry by all out-of-state bank holding companies. This argument flies in the face of the statute's evident purpose. As the Board observed, this argument,

> if accepted, would cause full interstate banking in those states [with limited entry statutes], a result contrary to the Congressional intent underlying the Douglas Amendment of allowing the states to apply their own policies regarding interstate banking to the acquisition by out-of-state bank holding companies of banks located within the borders of a state.

Id. Accord, First Bank System, Inc., 70 Fed. Res. Bull. 771, 773-774 (1984) (forbidding an interstate acquisition not explicitly authorized under state statutory law, taking into account "the purposes and legislative history of the Douglas Amendment, which reflect an intent to preserve the authority of the states over the structure of banking within their borders"); *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 386 (1984) ("[n]othing in the history of the Douglas Amendment suggests that the states were to be

Amendment to authorize the states to limit or restrict entry by out-of-state bank holding companies."[19]

The argument that states are required by the Douglas Amendment to approach interstate bank holding company expansion on an "all or nothing" basis also was rejected by the United States Court of Appeals for the District of Columbia Circuit in *Iowa Independent Bankers v. Board of Governors.*[20] In reviewing the Board's approval of a bank acquisition consistent with the Iowa statute discussed *supra,* the court noted that the language of the Douglas Amendment did not require such an approach. The legislative history of the Amendment, moreover, led the court to conclude "that the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy."[21]

In sum, the settled administrative interpretation of the Douglas Amendment, supported by the judicial decisions addressing the issue, is that the states may differentiate among out-of-state bank holding companies in permitting interstate bank acquisitions. Petitioners, apparently admitting this general view of the authority granted to the states by the Amendment, attempt to save their position by asserting that only some bases of differentiation, such as grandfather statutes, limited purpose entry statutes, or reciprocal statutes, are permissible, while the regional approach of the Connecticut and Massachusetts Acts is not.[22] The Douglas Amendment and its legislative history, however, contain not a hint of this distinction urged by Petitioners

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permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry").

[19]*Bank of New York Company, Inc.,* note 18 *supra,* 70 Fed. Res. Bull., at 528.

[20]Note 13 *supra,* 511 F.2d, at 1296-97.

[21]*Id.* at 1297. *See Conference of State Bank Supervisors v. Conover,* 715 F.2d 604, 613 (D.C. Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S. Ct. 1708 (1984) ("the Douglas Amendment empowered states to discriminate among out-of-state bank holding companies when deciding which could enter").

[22]Br. of Pet. Citicorp, 37-38.

between permissible and impermissible discrimination. Nor, as pointed out in the following section, can Petitioners find any basis for this distinction in the Commerce Clause.

D. Because the Douglas Amendment Authorizes the Connecticut and Massachusetts Acts, They Are Not Subject to the Negative Implications of the Commerce Clause

This Court has held consistently that Congress, acting under the Commerce Clause, may grant to the states authority to regulate interstate commerce that they would not otherwise enjoy. *See, e.g., Lewis v. BT Investment Managers, Inc., supra,* 447 U.S., at 44. In *Lewis,* this Court observed that in the Douglas Amendment, Congress has given to the states the authority "to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Id.* at 47. Because Connecticut and Massachusetts have acted within the scope of this general grant of authority to the states in enacting the Connecticut and Massachusetts Acts, their actions are "invulnerable to Commerce Clause challenge." *Western & Southern Life Ins. Co. v. State Board of Equalization, supra,* 451 U.S., at 653.

The Petitioners appear to argue, however, that Congress could not have granted authority to the states to adopt laws such as the Connecticut and Massachusetts Acts without violating the Commerce Clause. The regional approach adopted in the Acts, Petitioners urge, is inconsistent with the national market that is protected by the negative implications of the Commerce Clause. By contrast, according to Petitioners, state entry laws that discriminate on the basis of grandfather rules, limited purpose entry rules, or reciprocity requirements do not offend the negative implications of the Commerce Clause. Br. of Pet. Citicorp, at 37. Citing *Sporhase v. Nebraska, supra,* 458 U.S., at 960, for the proposition that "[t]he negative implications of the Commerce Clause . . . are the ingredients of the *valid* state law to which Congress" defers, Petitioners urge that the

negative Commerce Clause limits the types of laws the states may adopt to permit interstate bank holding company expansion.[23]

This Court rejected the Petitioners' approach to the Commerce Clause when it decided *Prudential Ins. Co. v. Benjamin, supra.* In that case, a state tax imposed only on out-of-state insurance companies was challenged as a violation of the Commerce Clause. Although the McCarran-Ferguson Act appeared to validate the tax, Prudential argued that such a conclusion would be inconsistent with the Commerce Clause. Prudential, the Court observed, "puts the McCarran Act to one side, either as not intended to have effect toward validating this sort of tax or, if construed otherwise, as constitutionally ineffective to do so." *Id.* at 422. The Court, disagreeing strongly with this suggestion, concluded that congressional grants to the states of the authority to regulate commerce are not limited by the negative implications of the Commerce Clause.[24] Rather, unless Congress by explicit exceptions limits such grants of authority, the states are empowered to exercise the full authority otherwise possessed by Congress to regulate the particular type of interstate commerce in question. Congress, as this Court observed, had "put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause . . . subject only to the exceptions expressly provided for." *Id.*, at 431.

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[23]As in *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S., at 422, Petitioners also assert that because of the policies of national markets recognized in the negative Commerce Clause, Congress did not intend to authorize such a regional approach. As pointed out *supra,* however, Congress rejected the notion of a national banking market when it adopted the Douglas Amendment. With the Douglas Amendment, Congress left it to the states, guided by their own local interests, to determine the extent to which the nation's segmented banking markets should be integrated.

[24]The Court summarized its view of Prudential's argument as follows:

> Fundamentally [Prudential] maintains that the commerce clause "of its own force" and without reference to any action by Congress, whether through its silence or otherwise, forbids discriminatory state taxation of interstate commerce. This is to say, in effect, that neither Congress acting affirmatively nor Congress and the states thus acting coordinately

The Douglas Amendment imposes no exceptions or limitations on the authority it grants to the states to permit interstate bank holding company expansion.[25] Petitioners' effort to create such exceptions or limitations by finding in the negative implications of the Commerce Clause distinctions between "permissible" and "impermissible" state laws authorizing bank holding company expansion is, therefore, futile. Discriminations more or less offensive to the Commerce Clause in the absence of the Douglas Amendment are all equally protected by that Amendment's unqualified grant of authority.[26]

Petitioners likewise mistakenly rely on negative Commerce Clause cases such as *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In those cases, no grant by Congress to the states of authority to regulate interstate commerce was present.

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can validly impose any regulation which the Court has found or would find to be forbidden by the commerce clause, if laid only by state action taken while Congress' power lies dormant. In this view the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation.

Merely to state the position in this way compels its rejection. So conceived, Congress' power over commerce would be nullified to a very large extent. For in all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power.

Prudential Ins. Co. v. Benjamin, supra, 328 U.S., at 422 (footnotes omitted).

[25]In contrast, the federal statutes and the compacts examined in *Sporhase v. Nebraska, supra,* did not even indicate congressional intent to delegate federal regulatory authority to the states. 458 U.S., at 959-960. Instead, Congress meant only to defer to, rather than preempt, otherwise valid state law. *Id.,* at 960. See n. 7 *supra.*

[26]While considerations arising from the negative Commerce Clause do not limit the authority delegated under the Douglas Amendment, other constitutional provisions do. Acting under the Commerce Clause, Congress may not authorize the states to exceed the limits imposed by other constitutional provisions. *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S., at 430, 434-435. Petitioners, however, have claimed only that the Connecticut and Massachusetts Acts violate the Commerce Clause and the Compact Clause, under both of which Congress does have authority to approve state activities not otherwise permissible.

Absent such an exercise of Congress' plenary power to regulate interstate commerce, this Court in these and other similar cases condemned state laws that were explicitly protectionist or imposed burdens on interstate commerce that outweighed the local benefits sought to be obtained by the enactment of the challenged state law. *Philadelphia v. New Jersey, supra,* 437 U.S., at 624, 626-627; *Pike v. Bruce Church, Inc., supra,* 397 U.S., at 142, 146. But where Congress acts to restrict or burden interstate commerce, the concerns voiced in these cases are simply inapplicable. *Western & Southern Life Ins. Co. v. State Board of Equalization, supra,* 451 U.S., at 653. Here, because Congress has acted to grant regulatory authority to the states by adopting the Douglas Amendment, it is inappropriate to pursue issues such as protectionism or balancing. Rather, the only question is whether Connecticut and Massachusetts have acted within the scope of the authority granted to them by Congress, a question which, as a matter of history, statutory language, and legislative record, must be answered in the affirmative.

II. The Connecticut and Massachusetts Acts Do Not Contravene The Compact Clause

The "Compact Clause" of the United States Constitution provides, in relevant part, that:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .

U.S. Const. art. I, § 10, cl.3. Consistent with this language, action may violate the Compact Clause only if it involves *an agreement or compact* between or among states.

A. No Agreement or Compact Has Been Formed

The state action challenged here involves independently enacted state statutes, rather than an agreement or compact between or among states. To illustrate this point, assume that only one New England state had passed an out-of-state bank holding company entry statute which was limited to bank holding companies located in New England. Such a statute

also would permit acquisitions across state lines subject to regional constraints, but *clearly* could not involve an agreement or compact. The added fact that an additional state legislative body has chosen, independently, to enact similar legislation should not transform such independent activity into an impermissible agreement or compact between or among the states.[27]

The reciprocity requirements of the Connecticut and Massachusetts Acts, in and of themselves, are of no consequence for purposes of the Compact Clause. In *United States Steel Corp. v. Multistate Tax Commission, supra,* 434 U.S., at 452, the Court noted that "several decisions of this Court have upheld a variety of interstate agreements effected through reciprocal legislation without congressional consent." *Id.* at 469. While "[a]greements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy", the mere form of such legislation is not the relevant inquiry. Rather, "[t]he relevant inquiry must be one of impact on our federal structure." *Id.* at 470-471. As discussed *infra,* the Connecticut and Massachusetts Acts lack any impact on the federal structure.

Furthermore, Petitioner Citicorp's argument that "reciprocal legislation such as that involved in this case is in and of itself sufficient to constitute a compact" (Br. of Pet. Citicorp, 40) is clearly inconsistent with recent activities of Petitioner Citicorp. For example, in 1983 Citicorp sought approval from the Board to acquire a bank in the State of

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[27]The Compact Clause appears initially to have been directed at resolving boundary disputes between the newly independent states. "[T]he Compact Clause has its roots deep in colonial history. It is part and parcel of the long and familiar story of colonial boundary controversies." F. Frankfurter & J. Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments,* 34 Yale L.J. 685, 692 (1925). This article, containing an in-depth study of the types of legislation which have elicited application of the Compact Clause, does not mention a single challenge under the Compact Clause to independent regional state legislation such as that under challenge in the present controversy. Similarly, Petitioners have failed to cite to any such decision.

Maine. This acquisition was premised on the constitutionality of both the Maine and New York interstate banking laws, which at that time allowed interstate acquisitions of banks by bank holding companies on a reciprocal basis. This acquisition by Petitioner of a New England bank, Citibank Maine, N.A., was approved by the Board in April 1984, as noted in *Citicorp,* 71 Fed. Res. Bull. 101, 102 (1985).[28]

Petitioners also place great weight on the fact that concerned individuals from the New England states met prior to the passage of the Connecticut and Massachusetts Acts to discuss their concerns over interstate banking. Br. of Pet. Citicorp, 40. It is difficult to perceive how the existence of these meetings may evidence the establishment of a compact. These meetings were not in any sense mandatory or binding on any of the New England states. In fact, New Hampshire and Vermont independently have chosen not to enact interstate banking legislation, Maine has chosen, again independently, to permit out-of-state bank holding company entry on a full nationwide basis, and Rhode Island has adopted a regional approach that will give way in 1986 to unlimited nationwide entry.

Each of the New England states has attempted to address its own local banking concerns in the manner best suited to that particular state. This authority was explicitly granted to each state in the Douglas Amendment. The fact that Connecticut and Massachusetts independently have recognized similar concerns and acted accordingly is insufficient to establish an impermissible compact between the states.

In *St. Louis & San Francisco Railway v. James,* 161 U.S. 545 (1896), this Court noted that a state may permissibly authorize a corporation organized under its laws to accept authority from another state to extend its operations into such other state, to receive a grant of powers to own and control property therein, and to subject itself to such rules and regulations as may be prescribed by the second state. The

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[28]The reciprocity requirement was removed from the Maine statute in February 1984. 1984 Me. Laws 597.

Court stated that "[s]uch legislation *on the part of two or more States* is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States." *Id.* at 562 (emphasis added). The Connecticut and Massachusetts Acts are precisely such legislation. They merely authorize the entry of private corporations into their respective states on a regional basis. Such independently enacted statutes do not, in fact, create an agreement or compact.

B. The Connecticut and Massachusetts Acts are Permissible Under Settled Compact Clause Doctrine

Even assuming, *arguendo,* that the Connecticut and Massachusetts Acts could be viewed as creating an agreement or compact, such action nevertheless clearly is permissible under this Court's long-settled Compact Clause precedents. In *Virginia v. Tennessee,* 148 U.S. 503 (1893), Mr. Justice Field suggested that congressional consent is required only for agreements or compacts that affect "the political power or influence" of individual states and "encroach . . . upon the full and free exercise of Federal authority." *Id.* at 520.

This interpretation was reaffirmed in this Court's decision in *New York v. O'Neill,* 359 U.S. 1 (1959). Although no Compact Clause question was presented directly in that case, the Court stated that:

> The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution. Far from being divisive, this legislation is a catalyst of cohesion. It is within the unrestricted area of action left to the States by the Constitution.

Id. at 6. The Connecticut and Massachusetts Acts are such voluntary and cooperative actions, taken by those states as independent exercises of their authority granted pursuant to the Douglas Amendment.

More recently, this Court noted in *New Hampshire v. Maine,* 426 U.S. 363 (1976), that the application of the Compact Clause is limited to agreements that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States . . . . Accordingly, [actions fall without the Compact Clause when] neither State can be viewed as enhancing its power in any sense that threatens the supremacy of the Federal Government." *Id.* at 369-70 (citations omitted).[29]

Even assuming an agreement or compact were deemed to exist in the present situation, it is difficult to perceive how such an arrangement could increase the "political power or influence" of any state or states or could "encroach upon or interfere with the just supremacy of the United States." Petitioners argue that the Connecticut and Massachusetts Acts create a compact that tends to cause injury to the sister states. Br. of Pet. Citicorp, 40. Petitioners have not established any such injury to a sister state, however, nor could such a finding be justified on the present record. To the extent that any limited injury could arguably occur as a result of the Connecticut and Massachusetts Acts, such injury would be solely to private parties such as Petitioners, rather than to a sister state or states as sovereign entities.

Further, Petitioners have not established any encroachment upon federal authority[30] other than to state their mere

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[29]In *United States Steel Corp. v. Multistate Tax Commission, supra,* 434 U.S., at 471, this Court noted that in *New Hampshire v. Maine, supra:*

> We reaffirmed Mr. Justice Field's view that the "application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' " This rule states the proper balance between federal and state power with respect to compacts and agreements among States. [citations omitted]

[30]*See* F. Zimmerman & M. Wendell, *The Law and Use of Interstate Compacts* (1976), at 23 ("[c]onceivably, compacts which might be said to

conclusion that the Connecticut and Massachusetts Acts "interfer[e] with and disrupt[ ] federal regulation of interstate banking." Br. of Pet. Citicorp, 42. This conclusion is clearly erroneous. The Connecticut and Massachusetts Acts in no way interfere with or disrupt federal regulation of interstate banking. As noted by the court of appeals,[31] Congress, through the Douglas Amendment, long ago granted control over this aspect of interstate banking to the individual states.[32]

Petitioners also attempt to establish that the Connecticut and Massachusetts Acts violate the Compact Clause merely because they may be distinguished from the "type of interstate agreement upheld in *Multistate Tax Commission.*" Br. of Pet. Citicorp, 44. Petitioners fail to mention, however, that the interstate compact which was upheld by the Court in that decision was far more likely to increase the political power or influence of the states and to encroach upon the supremacy of the United States than the challenged legislation.[33] In view of the Court's determination that there was no Compact

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have a discriminatory effect upon nonparty states could be described as affecting the political balance of the federal system. In actuality, there have been no compacts adopted or proposed in our history which have really affected that political balance"). As the court of appeals noted below, "[a]s a practical matter, we do not think that a New England bank holding company system would in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States." Pet. App. A32.

[31]The Board, as the court of appeals observed, has interpreted the Douglas Amendment as a renunciation of any federal interest in regulating the interstate acquisitions of banks by bank holding companies. Pet. App. A29. As this Court recently pointed out in *Securities Industry Association v. Board of Governors,* ___ U.S. ___, 104 S. Ct. 2979 (1984), the Board's interpretations of federal banking statutes are entitled to substantial deference.

[32]Petitioner's argument that the challenged legislation is "a substantial threat to federal policy articulated in 12 U.S.C. §1823(f)" (Br. of Pet. Citicorp, 46) is not tenable. That statute, regarding interstate acquisitions of failed banks, by its express terms controls such acquisitions "[n]otwithstanding . . . any other provision of law, state or Federal." 12 U.S.C. § 1823(f)(4)(i). Further, to the extent that the challenged state legislation were to conflict with federal legislation, it would be preempted pursuant to the Supremacy Clause, U.S. Const., art. VI, cl.2.

[33]In *United States Steel Corp. v. Multistate Tax Commission, supra,* the facts established that a Multistate Tax Compact, which authorized the

Clause violation in the "multilateral agreement" presented in that case, the independently enacted Connecticut and Massachusetts Acts cannot possibly violate the Compact Clause.

CONCLUSION

For the reasons set forth above, the decision and judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
WILLIAM G. DELANA
ALLAN B. TAYLOR
J. BRUCE BOISTURE*
ROBERT M. TAYLOR, III
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
Counsel for *Amicus Curiae*
Fleet Financial Group, Inc.

Of Counsel:

EDWARD W. DENCE, JR.
WILLIAM C. MUTTERPERL

**Counsel of Record*

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establishment of the Multistate Tax Commission, had been adopted with minor exceptions in twenty-one states. The Commission had authority, *inter alia,* to adopt uniform regulations which member states could reject, amend, or modify before adoption. Further, states were authorized to request that the Commission perform audits on their behalf. In so doing, the Commission could seek compulsory process in aid of its auditing powers in state courts. 434 U.S., at 803-805. Nevertheless, this "multilateral agreement creating an active administrative body with extensive powers delegated to it by the States, but lacking congressional consent" (*id.,* at 471) was not found to violate the Compact Clause.